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Issue Date: 11 February 2005

Case No.: 2003-LHC-375

OWCP No.: 06-159114

In the Matter of:

CHARLES A. WILLIAMS,
Claimant

vs.

INGALLS SHIPBUILDING, INC.,
Employer

APPEARANCES:

D.A. BASS-FRAZIER, ESQ.,
On Behalf of the Claimant

PAUL B. HOWELL, ESQ.,
On Behalf of the Employer

BEFORE: RICHARD D. MILLS
Administrative Law Judge

DECISION AND ORDER –SECTION 22 MODIFICATION

This proceeding relates to a dispute for Section 22 Modification under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., ("the Act" or "LHWCA"). The claim was originally filed by Charles A. Williams, Claimant, against his former employer, Ingalls Shipbuilding, Inc. ("Ingalls") for a back injury he sustained in 1994. [1]

[1] The following abbreviations will be used in citations to the record: JX - Joint Exhibit; CX - Claimant's Exhibit, RX - Respondent's Exhibit, and TR - Transcript of the Proceedings.

In the original decision, the Court found that Mr. Williams suffered a back injury on April 15, 1994, while in the course and scope of his employment with Ingalls. See Williams v. Ingalls Shipbuilding, Inc., Case No. 2003-LHC-375 (September 19, 2003, ALJ Mills); RX-2. The parties stipulated that Mr. William's average weekly wage at the time of his injury was $524.68. JX-1. The Court ordered Ingalls to pay Mr. Williams temporary total disability compensation from April 18, 1994 to April 20, 1994; April 22, 1994 to April 24, 1994; May 19, 1994 until July 10, 1994; February 15, 1995 until April 5, 1995; November 15, 1996 until December 2, 1996; March 3, 1997 until April 30, 1997; and August 21, 1999 until September 11, 2000. Id. at 21. The Court ordered Ingalls to pay Mr. Williams permanent total disability benefits commencing September 12, 2000, and continuing for a period of 104 weeks, after which time such permanent total disability benefits were to be paid from the Special Fund pursuant to Section 8(f) of the Act. Id. at 22. Pursuant to § 7 of the Act, the Court also ordered Ingalls to pay for reasonable and necessary medical treatment related to Mr. Williams's work-injury. Id.

The dispute currently before the Court concerns the issues of whether Mr. Williams is now partially, rather than totally disabled, and whether Ingalls is liable for Mr. Williams' psychiatric treatment. Ingalls asserts that suitable alternative employment was established in a May 7, 2004 labor market survey, while Mr. Williams asserts that he has diligently searched for work to no avail. Mr. Williams also asserts that he has developed depression due to his inability to work and seeks the authorization for treatment by the psychiatrist of his choice. A hearing was held on November 15, 2004 in Mobile, Alabama, at which time the parties were given the opportunity to offer testimony, documentary evidence, and to make oral argument. The following exhibits were received into evidence:

1) Joint Exhibit No. 1;

2) Claimant's Exhibits Nos. 1-3; and

3) Respondent's Exhibits Nos. 1-12.

Upon conclusion of the hearing, the record remained open for the submission of post-hearing briefs, which were timely received. This decision is being rendered after giving full consideration to the entire record.

STIPULATIONS[2]

The Court finds sufficient evidence to support the following stipulations:

1) This case is governed by the LHWCA. At the time of the alleged injury, Claimant was engaged in constructing Naval vessels alongside the navigable waters of the Gulf of Mexico in Pascagoula, Mississippi, at Ingalls Shipbuilding, Inc.

2) On April 15, 1994, Claimant suffered injury to his back within the course and scope of his employment with Ingalls.

3) Employer was advised of Claimant's injury on April 15, 1994.

4) A Notice of Controversion was filed on April 29, 1994.

5) An Informal Conference was held on April 15, 2002.

6) Claimant's average weekly wage at the time of injury was $524.68.

7) Claimant was paid temporary total disability benefits April 18, 1994 to April 20, 1994; April 22, 1994 to April 24, 1994; May 19, 1994 until July 10, 1994; February 15, 1995 until April 5, 1995; November 15, 1996 until December 2, 1996; March 3, 1997 until April 30, 1997; and August 21, 1999 until September 11, 2000.

8) Claimant was paid permanent total disability benefits September 12, 2000 through the present.

9) Medical benefits have been paid.

10) Claimant is permanently disabled at thirteen percent whole body impairment.

11) Claimant reached maximum medical improvement on September 12, 2000.

[2] JX-1.

ISSUES

The unresolved issues in these proceedings are:

1) Nature and extent of disability;

2) Reasonable and necessary medical benefits; and

3) Attorney's Fees and Interest.

SUMMARY OF THE EVIDENCE

I. TESTIMONY

Charles A. Williams

Mr. Williams is fifty years old. After graduating from high school, he spent approximately twenty years in the Army as a telecommunications specialist. TR 14. He began working for Ingalls in November 1993 as an electrician. TR 15. He sustained a back injury at Ingalls on April 15, 1994. TR 15. He resigned from Ingalls to work at Alta Telecommunication in May 1995. TR 15. He underwent a lumbar fusion on March 2, 2000 and reached MMI on September 12, 2000. TR 16. Dr. Peterson assigned the following physical restrictions: thirty pound lifting restriction, no bending, lifting, twisting, climbing or crawling, and five minute breaks after thirty minutes of standing and/or sitting. TR 19, 40. Mr. Williams obtained an Associate's Degree in Electronic Engineering Technology in May 2002. TR 17. Mr. Williams testified that he underwent knee surgery after the initial trial and was recuperating in September 2003. TR 20. He also testified that he was hospitalized for a few days as a result of a first degree burn to his right hand. TR 21.

Medical Treatment

Mr. Williams testified that he currently sees Dr. Peterson, who performed his back surgery, and Dr. Nichols, his pain management physician, on an as needed basis for flare-ups and back pain. TR 76. He testified that he has declined to receive further epidural steroid blocks from Dr. Peterson because they cause him to experience severe spinal headaches and the benefits only last two or three days. TR 76-77. He is currently prescribed Neurontin and Celebrex. TR 77.

Mr. Williams described his difficulties getting in and out of a vehicle. TR 78. He explained that after driving from Citronelle to Mobile, his body has been stiffened and his legs feel numb, making it difficult to get out of the vehicle and walk immediately. TR 78. Mr. Williams testified that he has difficulties sitting or standing for an extended

period of time. TR 79. When standing he has to constantly rock and move to reduce the pain. TR 79. He testified that he has difficulty sleeping at night and cannot focus during the day. TR 81. He explained that if he has to pick something up from off of the floor, it is difficult due to the combination of his bad back and his bad knees; his knees make it painful for him to squat and the rods in his back bar him from bending at the waist. TR 82.

Mr. Williams testified that he contacted Dr. Dickinson, his primary care physician at the VA, regarding his mental state, because he was deeply bothered by his inability to work. TR 81. He felt that the back surgery negatively altered his life. TR 81. He testified that his inability to work made him feel worthless, discouraged, and deprived of his manhood. TR 82. He explained that he was prompted to seek help when his wife told him he had been talking about harming himself. TR 82-84. He testified that Dr. Dickinson prescribed medications for depression or anxiety and referred him to the mental health department at the VA. TR 83-84. The records indicate that Mr. Williams requested authorization from Carrier on October 27, 2004 to see Dr. Dumont for mental health treatment. CX-2. Authorization was denied by Carrier. CX-3.

Job Search

Mr. Williams testified that after the original hearing he was having medical problems that prevented him from engaging in a job search. TR 20. He testified that after the initial trial, he was going back and forth to the VA Hospital to receive steroid injections in his knees. TR 23. He then went to Pensacola, Florida once a week for five weeks to receive another type of injection. TR 23. He testified that he underwent knee surgery in August 2003 and was recuperating in September 2003. TR 20, 23. He stated that he was released to work in December, at which point he was hospitalized again for a few days as a result of a first degree burn to his right hand. TR 21, 45. He stated that he was additionally visiting the VA Hospital frequently with heart flutters. TR 21-22.

Mr. Williams testified that he first looked for a job in April 2004, when he checked online for a position with the Department of Homeland Security. TR 22. However, he did not submit an application, as he already had an online application on file with the Department. TR 23.

Mr. Williams testified that he received the labor market survey conducted by Mr. Sanders on June 9, 2004 and that he began applying for the jobs within a few days. TR 24. He testified that he called Xante Corporation, then went there and submitted a resume. TR 97. He went on a first interview at Xante on July 13, 2004. TR 97. He did not receive a call back and has called to follow up, but no one has called him back. TR 97-98. On June 10, he called Teledyne and spoke with Peggy in Human Resources who instructed him to fax a resume to Harry Lisk, which he did. TR 92. On June 14, he

called Mr. Lisk to make sure his resume had been received and left a voice message. TR 93. On August 2, 2004, he called again and spoke with Gina in Human Resources who instructed him to email his resume to Mr. Lisk, which he did and has never heard a response. TR 93. On June 10, he also called NCO Group, a debt collection agency, and then submitted an application in person. TR 33, 94. However, he received paperwork from NCO Group that the job involved sitting for 7.5 hours and did not believe that this requirement fit his physical restrictions. TR 39-40, 94. On October 26, 2004, he called again to check on the status of his application, was notified that unsuccessful applicants may not be notified and has not received a call to date. TR 95-96. He next applied at Donovan's Carwash, but testified that an employee tore up his application in front of him when he asked for a contact name to put on his "Employee Contact Form." TR 33-34. He also went to Standard Parking, but was told they were not hiring. TR 98. He submitted a written application at Standard Parking to be kept on file. TR 99. On June 14, 2004, he went to Shell regarding a cashier position and spoke with Janet. TR 99. He was told that they were not hiring but would keep his application on file. TR 99. He made follow up contact on October 26 to no avail. TR 99. Mr. Williams testified that when he was trying to contact Xantee in June, the operator connected him to Huntsman/Vantico, which was formerly known as Xante. TR 100. He inquired if Huntsman was hiring, but was notified that they were not. TR 100.

On August 2, 2004, he contacted Kimberly-Clark; they were not hiring, but he was told they filled open positions from resumes on file at the Alabama State Employment Service. TR 100. Mr. Williams testified that he already had a resume on file at the Alabama State Employment Service, but also submitted a resume online to Kimberly-Clark. TR 100-101. On August 18, 2004, he was notified by way of a listserv hosted by his former electronics instructor, of an opening at Evergreen Technologies. TR 85-88. Mr. Williams contacted Mr. Lee of Evergreen Technologies by telephone the next day and then went on an office interview; however, he never heard a response from Mr. Lee. TR 87. He followed up on the interview and was notified that the position had been filled. TR 87.

On September 8, 2004, he found an electronics position available at OMRON IDT Controls posted on the listserv. TR 88-89. He contacted Bob Morgan at OMRON and emailed him his resume. TR 89. Mr. Williams testified that he called Mr. Morgan on October 29, 2004 and set up an interview for November 1, 2004. TR 90. During the interview, Mr. Williams was asked to look over a prerequisite job test he would be required to pass and determine if he had an understanding of the material. TR 91. Mr. Williams testified that the test contained electrical symbols that he had not learned in his coursework, and when he notified Mr. Morgan, he was told he did not qualify for the job. TR 91. He testified that on September 27, 2004, he went to ADT of his own accord and submitted his resume; he has not heard back from ADT and is unable to get in touch with their office. TR 106. He testified that on September 27, 2004, he also went to ITC Deltacom and submitted his resume, but was informed they were not hiring. TR 107.

He applied at Mobile Engineers on October 25, 2004 and Degusa on October 26, 2004. TR 42. In October, he testified that he also returned to Standard Parking and Xante for follow-up. TR 42. On October 21, 2004, he contacted Mobile County Personnel Board again and conducted an online job search at "MobileHasJobs.com," but found nothing available. TR 43, 103. He also visited a website called "MobileHelpwanted," but did not find anything within his qualifications. TR 105-106. Mr. Williams testified that he built a resume and submitted it online for federal government jobs, but has heard nothing. TR 102. Mr. Williams testified that he used the newspaper to look for jobs and found listings for a quality control position and a computer-oriented job; however, when he contacted the employer, it was a company called "Pro Resources" that requested a $170 application fee, but could not guarantee him a job. TR 105. He testified that he looked in the newspaper for jobs in November, but did not find anything. TR 42.

Mr. Williams testified that he dresses neatly and is always polite when applying for jobs. TR 108-109. He testified that if a potential employer contacted him with a job offer, he would accept it. TR 109. He testified that he went to school so that he could get back into the workforce, but he cannot find a job. TR 110. He testified that when he is job searching he gets discouraged when he hears that a job has been offered to a student rather than to him. TR 111. He testified that he plans to continue looking for a job. TR 111.

II. MEDICAL EVIDENCE: Reports

Brendt Petersen, M.D.

Dr. Petersen placed Mr. Williams at MMI for his back injury on September 12, 2000. RX-8, p. 1. He rated him at thirteen percent permanent partial impairment to his body as a whole, permanently restricted him from lifting greater than thirty pounds, bending, twisting, climbing and crawling, and required that he receive five minute breaks between every thirty minutes of sitting or standing. RX-8, p. 2. Dr. Peterson last saw Mr. Williams on June 23, 2004 and noted that Mr. Williams had redevelopment of lower back discomfort and bilateral lower extremity radiculitis. RX-8, p. 4.

Chris T. Nichols, M.D.

Dr. Nichols saw Mr. Williams on April 21, 2003 and diagnosed him with degenerative disc and chronic low back pain. RX-9, p. 1. He increased the Neurontin and prescribed Celebrex. RX-9, p. 1. He also saw Mr. Williams on June 10, 2003, when Mr. Williams notified him that the TENS unit was not helping him and told him that he could return for an epidural as needed. RX-9, p. 2.

III. VOCATIONAL EVIDENCE: Testimony and Reports

Tommy G. Sanders

Mr. Sanders is a certified rehabilitation counselor who was retained by Ingalls in this case. TR 47. He conducted a labor market survey dated May 7, 2004. RX-11, p. 9-11. The first job indicated was as an electronic repair technician at Zantee [sic] Corporation in Mobile. The job would allow for alternating between sitting and standing. It had a twenty-five pound lifting requirement and involved squatting or bending to lift electrical boards out of boxes. The position was full time and paid a wage of $9.00 per hour. RX-11, p. 9. The second job indicated was as an electronic specialist at Teledyne Continental Motors in Mobile. It required an associate's degree in electronic engineering and four years experience as an electrician. The job had a twenty pound lifting requirement and involved infrequent bending if something is dropped to the floor. The job allowed for alternating between sitting and standing. It was full-time and paid a wage of $20.02 per hour. RX-11, p. 9-10. The third job indicated was as a debt collector at NCO Group in Theodore, Alabama. It was a sedentary position involving telephone calls and computer work, but would allow for alternating between sitting and standing. The job was full-time and paid $8.00 per hour. RX-11, p. 10. Mr. Sanders also indicated jobs as a cashier at Standard Parking, Donovan's Car Wash in Mobile, and Shell in Theodore. Each of these jobs had lifting requirements of twenty pounds or less, allowed for alternate sitting, standing or walking, and involved infrequent bending or squatting. Each job was full-time and paid wages of $5.15 to $6.50 per hour. RX-11, p. 11.

At the formal hearing, Mr. Sanders testified that he found other available jobs fitting Mr. Williams's profile. TR 53. He indicated that in late May 2004, he found a position as a front desk clerk trainee at Econo Lodge, which was a full-time position paying $6.00 per hour and a position as a delivery driver for Papa John's Pizza at a wage of $5.15 per hour. TR 53. He testified that in June of 2004 NCO Group was again hiring debt collectors and that Yellow Cab was hiring a twenty-five hour per week dispatcher at a rate of $5.15 per hour. TR 53. In July 2004, he found a position as a full-time cab dispatcher at Michael's Taxi at a rate of $5.15 per hour and a position as a full-time cashier at Pronto Pawn at a rate of $6.00 per hour. TR 53. In October 2004, Wal-Mart was hiring a fuel booth cashier and LabCorp was hiring a service representative at a wage of $8.00 per hour. TR 53-54. Mr. Sanders shared this information with the insurance adjuster and with Employer's attorney, but did not know if the information was shared with Mr. Williams. TR 56.

Mr. Sanders opined that Mr. Williams has not shown a diligent effort to find alternative employment because of his failure to look for any work throughout the nine to ten months after the first trial. TR 54. He also points to the two month gap in Mr. Williams' job search after he contacted the jobs in the labor market survey in June. TR 55.

Sue N. Berthaume

Ms. Berthaume is a certified rehabilitation counselor who was retained by the U.S. Department of Labor in March of 2001 to assist Mr. Williams. TR 65. She has been working with his case until it was closed in June 2004. TR 66. She testified that her job search for Mr. Williams focused on jobs where he could use his electronic engineering technology degree, but the job openings were scarce. TR 66. She testified that she did not search for any unskilled or semi-skilled jobs for Mr. Williams. TR 68. Subsequent to the original hearing, Ms. Berthaume first had contact with Mr. Williams on September 5, 2003, and Mr. Williams reported to her that he was recuperating from knee surgery. RX-10, p. 18. Ms. Berthaume noted that he would be assisted with job placement services upon release by his physician. RX-10, p. 19. She next spoke with Mr. Williams on December 29, 2003, and he reported that upon release by his doctor he was hospitalized for two days in connection with first degree burns to his right hand. RX-10, p. 21. He told her that he was entering physical therapy, but would like to resume job placement the following week. RX-10, p. 21. Ms. Berthaume testified that on January 26, 2004, she noted that she spoke with Mr. Williams on the telephone and he informed her that he had been searching for job openings. TR 73; RX-10, p. 24. Her next contact with Mr. Williams was on March 11, 2004, during which interval she had found two possible jobs for Mr. Williams: a position as a network engineer and a position as a web developer. RX-10, p. 25. Mr. Williams reported that he did not have the qualifications for those jobs. RX-10, p. 25. He notified her that he had submitted applications at Mobile Infirmary and University of South Alabama Medical Center and had been reviewing the newspapers and the Alabama Personnel Service listings. RX-10, p. 25. Ms. Berthaume's records reflect that his case was closed on June 15, 2004 because Mr. William's knew was presenting problems again and his medical treatment prevented him from actively participating in the job search program. RX-10, p. 28.

She testified that she has not conducted a field specific labor market survey in the past few months, but stated that, in general, the job market in Mobile has recently been picking up. TR 67. Ms. Berthaume testified that although she has only sought jobs in the electronics field for Mr. Williams, she knows of jobs as cashiers and security guards that have been available in the Mobile area labor market since June 2003. TR 69. She testified that when she was working with Mr. Williams he would look for work and apply for any jobs she discussed with him. TR 70. She testified that during her contacts with Mr. Williams he turned in applications at the places she recommended, he reported

applying for jobs beyond what she had recommended, and that he had a positive disposition towards returning to work. TR 73. She testified that since the previous trial in June 2003, Mr. Williams reported to her that his inability to look for jobs was due to medical problems. TR 71.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact and conclusions of law are based upon the Court's observations of the credibility of the witnesses, and upon an analysis of the medical records, applicable regulations, statutes, case law, and arguments of the parties. As the trier of fact, this Court may accept or reject all or any part of the evidence, including that of expert medical witnesses, and rely on its own judgment to resolve factual disputes and conflicts in the evidence. See Todd Shipyards v. Donovan, 300 F.2d 741 (5th Cir. 1962). In evaluating the evidence and reaching a decision, this Court applies the principle, enunciated in Director, OWCP v. Greenwich Collieries, 114 S.Ct. 2251 (1994), that the burden of persuasion is with the proponent of the rule. The "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, will not be applied, because it violates § 556(d) of the Administrative Procedure Act. See Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 281, 114 S.Ct. 2251, 2259, 129 L.Ed. 2d 221 (1994).

I. MODIFICATION OF EXTENT OF DISABILITY

Disability under the Act means, "incapacity as a result of injury to earn wages which the employee was receiving at the time of injury at the same or any other employment." 33 U.S.C. § 902(10). Therefore, in order for a claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological impairment. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Under this standard, an employee will be found to have no loss of wage earning capacity, a total loss, or a partial loss. The burden of proving the nature and extent of disability rests with the claimant. Trask v. Lockheed Shipbuilding Constr. Co., 17 BRBS 56, 59 (1980).

The nature of a disability can be either permanent or temporary. A disability classified as permanent is one that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. SGS Control Servs. v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, 17 BRBS at 60. Any disability suffered by the claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metro. Area Transit Auth., 16 BRBS 231 (1984); SGS Control Servs., 86 F.3d at 443.

The date of maximum medical improvement is the traditional method of determining whether a disability is permanent or temporary in nature. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235 n.5, (1985); Trask, 17 BRBS at 60; Stevens v. Lockheed Shipbuilding Co., 22 BRBS 155, 157 (1989). The date of maximum medical improvement is the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. This date is primarily a medical determination. Manson v. Bender Welding & Mach. Co., 16 BRBS 307, 309 (1984). It is also a question of fact that is based upon the medical evidence of record, regardless of economic or vocational consideration. Louisiana Ins. Guar. Ass'n. v. Abbott, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994); Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamic Corp., 10 BRBS 915 (1979).

In this case, the parties have stipulated that Mr. Williams' back injury reached maximum medical improvement on September 12, 2000. JX-1. This stipulation is supported by the opinion of Dr. Peterson. RX-8, p. 1. Therefore, the Court finds that Mr. Williams' disability became permanent on September 12, 2000.

A. SUITABLE ALTERNATIVE EMPLOYMENT

The extent of disability can be either partial or total. To establish a *prima facie* case of total disability, the claimant must show that he cannot return to his regular or usual employment due to his work related injury. See Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989); Harrison v. Todd Pac. Shipyards Corp., 21 BRBS 339 (1988). Total disability becomes partial on the earliest date that the employer establishes suitable alternative employment. Rinaldi v. General Shipbuilding Co., 25 BRBS 128 (1991). To establish suitable alternative employment, an employer must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. New Orleans Stevedores v. Turner, 661 F.2d 1031 (5th Cir. 1981); McCabe v. Sun Shipbuilding & Dry Dock Co., 602 F.2d 59 (3d Cir. 1979). For the job opportunities to be realistic, however, the employer must establish their precise nature, terms, and availability. Thompson v. Lockheed Shipbuilding & Constr. Co., 21 BRBS 94, 97 (1988). A failure to prove suitable alternative employment results in a finding of total disability. Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989).

In our original decision, the Court found that a *prima facie* case of total disability was established. See Williams v. Ingalls Shipbuilding, Inc., Case No. 03-LHC-375 (September 19, 2003, ALJ Mills). In seeking this § 22 Modification, Ingalls does not assert that Mr. Williams is now able to perform his usual employment as an electrician/tac welder, and such an assertion would be without merit based on the medical evidence in this case. Dr. Peterson assigned permanent restrictions for Mr. Williams of

no lifting greater than thirty pounds, no bending, twisting, climbing, or crawling, and five minute breaks after thirty minutes of standing and/or sitting. RX-8, p. 1. Therefore, the Court finds that Mr. Williams is not capable of returning to his usual employment at Ingalls as an electrician/tac welder.

The Court further finds that Ingalls has established suitable alternative employment. In his May 7, 2004 labor market survey, Mr. Sanders identified six positions suited to Mr. Williams based on his physical and mental capacities, including his age, education, background, and physical capabilities. RX-11, p. 9-11. The first position was as a full-time electronic repair technician at Zantee [sic] Corporation in Mobile, paying $9.00 per hour. The job had a twenty-five pound lifting requirement and involved squatting or bending to lift electrical boards out of boxes; it would allow for alternating between sitting and standing. RX-11, p. 9. According to Dr. Peterson's restrictions, Mr. Williams is allowed to lift up to thirty pounds and is capable of sitting or standing in thirty minute intervals. RX-8, p. 1. Although Mr. Williams is restricted from bending, the job description specifies that he can squat to lift the electrical boards out of the boxes. RX-11, p. 9. The second position was as a full-time electronic specialist at Teledyne Continental Motors in Mobile, paying $20.02 per hour. Mr. Williams possessed the requisite electronic engineering associate's degree and four years electrician experience and was capable of the twenty pound lifting requirement. RX-11, p. 9-10. The job allowed for alternating between sitting and standing. The Court finds that the requirement of infrequent bending complies with Dr. Peterson's testimony that Mr. Williams' could do occasional infrequent bending, but no bending in a repetitive or prolonged fashion.[3] The third position was as a full-time debt collector at NCO Group in Theodore, Alabama, paying $8.00 per hour. It was a sedentary position involving telephone calls and computer work, but would allow for alternating between sitting and standing. RX-11, p. 10. Mr. Sanders also indicated three cashier jobs: at Standard Parking, Donovan's Car Wash, and Shell. Each of these jobs had lifting requirements of twenty pounds or less, allowed for alternate sitting, standing or walking, and involved only infrequent bending or squatting. Each job was full-time and paid wages of $5.15 to $6.50 per hour. RX-11, p. 11. The Court finds that these jobs comport with Dr. Peterson's work restrictions and qualify as suitable alternative employment.

Mr. Sanders also testified as to the availability of seven additional jobs, not included in the labor market survey issued to Mr. Williams. TR 53-54. While Mr. Sanders testified that he believed Mr. Williams would be physically capable of performing these jobs, he did not describe their physical requirements. TR 52-54. Due to the lack of information in this regard, the Court must err on the side of caution in evaluating the physical suitability of these positions. Mr. Sanders indicated a full-time front desk clerk trainee position at Econo Lodge and a delivery driver position at Papa

[3] In Dr. Peterson's deposition, submitted as evidence at the original hearing, Dr. Peterson clarified that Mr. Williams could not bend, lift, twist or crawl "in a repetitive or prolonged fashion." See Williams v. Ingalls Shipbuilding, Inc., Case No. 03-LHC-375 (September 19, 2003, ALJ Mills), RX-22, p. 17-18.

John's Pizza, both available in late May 2004. TR 53. The Court finds the front desk clerk position suitable based on its finding of suitability of similar hotel desk clerk positions in the original decision and order. See Williams, Case No. 2003-LHC-375, p. 16. However, the Court finds that the delivery driver position is not suitable, because Mr. Williams testified that he had difficulties getting in and out of a vehicle. TR 78. Mr. Sanders testified that in June of 2004 Yellow Cab was hiring a twenty-five hour per week dispatcher. TR 53. The Court finds that the cab dispatcher position is not suitable. Cab dispatcher positions generally require good knowledge of the city, and the Court questions whether Mr. Williams, who lives in Citronelle approximately thirty-five miles from Mobile, possesses such knowledge. See TR 27. In July 2004, Mr. Sanders indicated another cab dispatcher position at Michael's Taxi and a cashier position at Pronto Pawn. TR 53. The Court finds the dispatcher position unsuitable as previously discussed. The Court also finds the cashier position at Pronto Pawn unsuitable because the lack of a description of duties leaves open the possibility that Mr. Williams may be required to lift or bend beyond the scope of his physical limitations to reach inventory in the pawn shop. Mr. Sanders lastly testified that in October 2004, Wal-Mart was hiring a full-time fuel booth cashier and LabCorp was hiring a service representative to pick up medical supplies and samples. TR 53-54. The Court finds that the fuel-booth cashier position at Wal-Mart is suitable, as the Court can conclude that a fuel-booth cashier would be limited to accepting payment from customers and may sit or stand to do so. However, the Court finds that the LabCorp position is unsuitable as it involves getting in and out of a vehicle and may include lifting and bending beyond Mr. Williams' physical capabilities.

In conclusion, the Court finds the front desk clerk trainee position available at Econo Lodge in late May 2004 and the fuel-booth cashier position at Wal-Mart available in October 2004 to be suitable alternative employment for Mr. Williams based on his physical and mental capacities, including his age, education, background, and physical capabilities. Given the foregoing, the Court finds that Ingalls has successfully demonstrated the existence of suitable alternative employment as of late May 2004. In the absence of a specific date in May 2004, the Court assigns the date of May 31, 2004.

B. DILIGENCE AND WILLINGNESS TO WORK

Once the employer meets its burden and shows suitable alternative employment, the burden shifts back to the claimant to prove a diligent search and willingness to work. See Williams v. Halter Marine Serv., 19 BRBS 248 (1987). If the employee does not prove this, then at the most, his disability is partial and not total. See 33 U.S.C. § 908(c); Southern v. Farmers Export Co., 17 BRBS 64 (1985). Having outlined potential jobs that were available to Mr. Williams, the Court will now evaluate Mr. Williams' diligence and willingness to work since the original hearing on June 11, 2003.

The Court finds that Mr. Williams ultimately did not demonstrate diligence and a willingness to work in his job search, because he did not search for unskilled and semi-skilled jobs. Therefore, the Court finds that Mr. Williams' disability became partial on the date of Ingalls' first showing of suitable alternative employment, May 31, 2004.

The Court notes that Mr. Williams was initially prevented from conducting a job search after the original hearing on June 11, 2003 due to medical problems unrelated to his work injury. Mr. Williams testified that he was receiving frequent steroid injections in his knees, sometimes requiring travel to Pensacola, Florida, until he underwent knee surgery in August 2003; he was recuperating through December 2003. TR 20, 23. However, during this time period he was in contact with his rehabilitation counselor, Ms. Berthaume. His testimony is corroborated by her records, which indicate that she spoke with him in September 2003 about his knee surgery and recuperation and that he was anxious to begin his job search upon release by his doctor. RX-10, p. 18, 21. The Court finds Mr. Williams' actions during this time period to be reasonable. Ms. Berthaume's records also indicate that Mr. Williams was job searching in January 2004 and that he applied for two jobs and had been searching the newspapers and Alabama Personnel Service listings in March 2004. RX-10, p. 24-25. In June 2004, Mr. Williams timely submitted resumes for each of the listed positions in Mr. Sanders' May 7, 2004 labor market survey and experienced no success of employment. TR 97-100. Ms. Berthaume documented looking for electrical technician positions to no avail from January through June 2004. RX-10. For these reasons, the Court does not find Mr. Williams' lack of success to be indicative of deficient effort. Nevertheless, Mr. Williams' diligent search for electrical technician jobs is frustrated by the fact that he did not diligently search for the types of unskilled or semi-skilled jobs indicated by the Court as suitable employment in its original decision and order.[4] The only unskilled/semi-skilled jobs for which Mr. Williams applied were the cashier positions listed in Mr. Sanders' May 7, 2004 labor market survey. TR 97-100. Because Mr. Williams did not search for any unskilled/semi-skilled jobs of his own accord, the Court finds that he did not prove a diligent search.

Given the foregoing, the Court finds Mr. Williams' disability to be partial as of the date Ingalls first showed suitable alternative employment on May 31, 2004. The parties have stipulated that Mr. Williams' average weekly wage was $524.68. JX-1. Therefore, beginning May 31, 2004, Mr. Williams is entitled only to permanent partial disability compensation based on an average weekly wage of $524.68 and reduced by a residual wage-earning capacity as determined below.

[4] In the original decision and order, the Court found hotel desk clerk positions, hotel night auditor positions, a sales associate position, and a telemarketing position to be suitable alternative employment for Mr. Williams. See Williams, Case No. 03-LHC-375, p. 16.

C. WAGE-EARNING CAPACITY

The determination of post-injury wage-earning capacity in cases of permanent partial disability is governed by §§ 8(c) and 8(h) of the Act, 33 U.S.C. §§ 908(c) and 908(h). La Faille v. Benefits Review BD., 884 F.2d 54, 60, 22 BRBS 108, 118 (CRT)(2nd Cir. 1989). Because Claimant's injury is not of a kind specifically identified in the schedule set forth in §§ 8(c)(1)-(20), it falls under § 8(c)(21). 33 U.S.C. §§ 908(c)(1)-(21). Under § 8(c)(21), compensation is set at 66 2/3 percent of the difference between claimant's average weekly wages at the time of the injury and his post-injury wage-earning capacity, as determined pursuant to § 8(h) of the Act. Bethard v. Sun Shipbuilding & Dry Dock Co., 12 BRBS 691, 693 (1980); 33 U.S.C. § 908(c)(21).

Section 8(h) provides in part that post-injury wage-earning capacity shall be determined by claimant's actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity. Bethard, 12 BRBS at 693; 33 U.S.C. § 908(h). However, if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the Court may, in the interest of justice, fix such wage earning capacity as shall be reasonable, having due regard to the nature of the employee's injury, the degree of physical impairment, the employee's usual employment, and any other factors or circumstances which may affect the employee's capacity to earn wages in a disabled condition, including the effect of disability as it may naturally extend into the future. 33 U.S.C. § 908(h). Furthermore, §§ 8(c)21 and 8(h) of the Act require that the wages earned in a post injury job be adjusted to account for inflation in order to represent the wages that job paid at the time of the claimant's injury, insuring that wage-earning capacity is considered on an equal footing with the determination under § 10 of average weekly wage at the time of the injury. Richardson v. General Dynamics Corp., 19 BRBS 48, 49-50 (1986); Bethard, 12 BRBS at 695; La Faille, 884 F.2d at 61, 22 BRBS at 120. The Benefits Review Board has held that the percentage increase in the National Average Weekly Wage ("NAWW") for each year should be used to adjust a claimant's post-injury wages for inflation. Richardson v. General Dynamics Corp., 23 BRBS 327, 330-31 (1990). In addition, a court may average the hourly wages of jobs found to be suitable alternative employment in order to calculate wage-earning capacity. Avondale Industries v. Pulliam, 137 F.3d 326, 328, 32 BRBS 65, 67 (5th Cir. 1998).

In the present case, Employer showed two suitable employment opportunities for Mr. Williams. The Econo Lodge desk clerk trainee position was available 40 hours per week and paid $6.00 per hour, equating to a weekly wage of $240.00. TR 53. The Wal-Mart fuel booth cashier position was available 32 or more hours per week, but the wage was not specified. TR 53. The Court finds the wage of $6.00 per hour to be representative of the type of earnings Mr. Williams would reasonably be capable of obtaining, given his physical impairments. Therefore, the Court uses the desk clerk

position as its basis for finding that Mr. Williams' wage-earning capacity on May 31, 2004, the date suitable alternative employment was established, is $240.00 per week. The Board has held that the percentage increase in the National Average Weekly Wage ("NAWW") for each year should be used to adjust a claimant's post-injury wages for inflation. Quan v. Marine Power & Equipment Co., 30 BRBS 124, 127-28 (1996); Richardson v. General Dynamics Corp., 23 BRBS 327, 330-31 (1990). The NAWW for May 2004 is $515.39, and the NAWW for April 1994, the date of Mr. Williams' injury, is $369.15. United States Dept. of Labor, Employment Standards Administration (February 2, 2004). Adjusting the May 2004 average weekly wage of $240.00 in consideration of the April 1994 NAWW, the Court finds that the proper wage-earning capacity for Mr. Richmond in April 1994 was $171.90 per week.[5] Therefore, the Court finds that the proper wage-earning capacity for Mr. Richmond in April 1994 wages is $171.90 per week.

II. MODIFICATION OF MEDICAL BENEFITS

In this §22 Modification, Claimant seeks future medical benefits to provide treatment for depression he claims to suffer due to his inability to work. In order to be entitled to reasonable medical treatment for depression under the Act, the claimant must first establish that his psychological condition was caused, aggravated, or contributed to by the work accident. Hargrove v. Strachan Shipping Co., 32 BRBS 11 (1998).

A. FACT OF INJURY AND CAUSATION

Claimant can invoke the Section 20(a) presumption by proving that he has a psychological condition and that an accident occurred which could have caused the impairment. See Sanders v. Alabama Dry Dock & Shipbuilding Co., 22 BRBS 340 (1989). Once invoked, the presumption shifts the burden to the employer to rebut it with substantial evidence that Claimant's injury was not caused, aggravated or contributed to by the work accident. Bath Iron Works Corp. v. Director, OWCP, 109 F.3d 53, 31 BRBS 19 (CRT) (1st Cir. 1997). Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept to support a conclusion. Sprague v. Director, OWCP, 688 F.2d 862, 865 (1st Cir. 1982). If employer succeeds, causation must be resolved based on the record as a whole; if the presumption is not rebutted, a causal relationship is established as a matter of law. Universal Maritime Corp. v. Moore, 126 F.3d 256, 262 (4th Cir. 1997); Devine v. Atlantic Container Lines, G.I.E., 25 BRBS 15, 21 (1991).

[5] The Court arrived at these figures by calculating the proportion: *x*/ $369.15 = $240.00/$515.39.

The Court finds that Mr. Williams has established that he suffers from a psychological condition. According to Mr. Williams' testimony, his primary care physician at the VA hospital prescribed medications for depression and referred him to the mental health department at the hospital. TR 83-84. He further testified that his inability to work caused him to feel worthless and deprived of his manhood, that he has difficulty sleeping, and that his wife told him he had been talking of harming himself. TR 81-84. The Court found Mr. Williams to be a credible witness and accepts his testimony as true. The fact that Mr. Williams has been prescribed medication for depression and referred by a physician to the mental health department of a hospital establishes that he suffers from a psychological condition. Additionally, his testimony that his inability to work gives him feelings of worthlessness shows that his psychological condition could have been caused by his loss of working capacity due to his work-injury. TR 81-84. Therefore, Mr. Williams is entitled to the Section 20(a) presumption.

Employer has not produced substantial evidence establishing that Mr. Williams' psychological condition was not caused, aggravated or contributed to by the work accident. Employer asserts that Mr. Williams' own admission relates his depressive mental condition to the anesthesia administered before his most recent knee surgery. At the hearing, Claimant described an episode of unusual behavior occurring immediately after his knee surgery and speculated that this behavior was attributable to the anesthesia from the surgery. TR 115. However, the Court does not find this isolated incident to be substantial countervailing evidence sufficient to rebut the Section 20(a) presumption. Without the benefit of further evidence, the Court finds that Employer has failed to rebut the Section 20(a) presumption; therefore, a causal relationship between Mr. Williams' work injury and psychological condition is established as a matter of law.

B. REASONABLE AND NECESSARY MEDICAL EXPENSES

Section 7(a) of the Act provides that:

> (a) the employer shall furnish such medical, surgical, and other attendance or treatment, nurse or hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process or recovery may require. 33 U.S.C. § 907(a).

In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. Parnell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must be appropriate for the injury. 20 C.F.R. § 702.402. A claimant has established a prima facie case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-58 (1984). The claimant

must establish that the medical expenses are related to the compensable injury. See Pardee v. Army & Air Force Exch. Serv., 13 BRBS 1130 (1981); see also Suppa v. Lehigh Valley R.R. Co., 13 BRBS 374 (1981). The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. See Atlantic Marine v. Bruce, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981), aff'g 12 BRBS 65 (1980). An employee cannot receive reimbursement for medical expenses unless he has first requested authorization, prior to obtaining treatment, except in cases of emergency or refusal/neglect. 20 C.F.R. § 702.421; see also Shahady v. Atlas Tile & Marble Co., 682 F.2d 968 (D.C. Cir. 1982)(per curiam), rev'g 13 BRBS 1007 (1981), cert. denied, 459 U.S. 1146 (1983); McQuillen v. Horne Brothers Inc., 16 BRBS 10 (1983); Jackson v. Ingalls Shipbuilding, 15 BRBS 299 (1983).

Because the Court finds a causal relationship between Mr. Williams' psychological condition and his work injury, he is entitled to future medical benefits for his condition. Mr. Williams correctly requested authorization for treatment by the psychiatrist of his choice, Dr. Dumont. CX-2. Ingalls' carrier subsequently denied his request. CX-3. The Court finds treatment by a psychiatrist for depression related to his work injury to be both reasonable and necessary, based upon the recommendation made by Mr. Williams' primary care physician. Moreover, Mr. Williams' treatment by a psychiatrist is not a change of physicians over which Ingalls has discretion to authorize or deny. Section 907(c)(2) mandates that the employer *shall* give consent for treatment where the claimant's initial choice of physician was not of a specialist whose care is necessary for proper care of his injury. 33 U.S.C. § 907(c)(2). A psychiatrist is a specialist over which Mr. Williams is entitled to exercise his choice. See Hargrove, 32 BRBS 11, n.9. Therefore, the Court finds Ingalls responsible for the Mr. Williams' medical expenses related to his depression, including treatment by his chosen psychiatrist, Dr. Dumont.

ATTORNEY'S FEES

Under Section 28(b) of the Act, when an employer voluntarily pays benefits and thereafter a controversy arises over additional compensation due, the employer will be liable for an attorney's fee if the claimant succeeds in obtaining greater compensation than that paid by the employer. See 33 U.S.C. § 928(b); Moody v. Ingalls Shipbuilding, Inc., 27 BRBS 173, 176 (1993). Under Section 28(b) of the Act, when an employer voluntarily pays or tenders benefits and thereafter a controversy arises over additional compensation due, the employer will be liable for an attorney's fee if the claimant succeeds in obtaining greater compensation than that paid or tendered by employer. See 33 U.S.C. § 928(b); Moody, 27 BRBS at 176. In awarding a fee, the administrative law judge must take into account the quality of the representation, the complexity of the legal issues involved, and the amount of benefits awarded. 20 C.F.R. § 702.132; Muscella v. Sun Shipbuilding & Dry Dock Co., 12 BRBS 272 (1980).

In this proceeding, Claimant has succeeded in obtaining additional medical benefits for psychiatric treatment. Success on this singular issue, for which Claimant presented nominal evidence and argument, entitles Claimant to reasonable attorney's fees to be paid by Employer.

Accordingly,

The Court's original Decision and Order, entered on September 19, 2003, is modified as follows:

ORDER

It is hereby **ORDERED, ADJUDGED AND DECREED** that:

(1) Commencing May 31, 2004, and continuing, Claimant shall receive permanent partial disability benefits, based on an average weekly wage of $524.68 to be reduced by a residual wage-earning capacity of $171.90 per week, to be paid from the Special Fund pursuant to Section 8(f) of the Act.

(2) Employer/Carrier shall be entitled to a credit for all payments of compensation previously made to Claimant.

(3) Employer/Carrier shall continue to pay Claimant for all reasonable and necessary medical expenses that are the result of Claimant's work injury, including psychiatric treatment.

(4) Claimant's counsel shall have thirty (30) days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have thirty (30) days from receipt of the fee petition in which to file a response.

(5) All calculations necessary for the payment of this award are to be made by the OWCP District Director.

So ORDERED.

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RICHARD D. MILLS
Administrative Law Judge